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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 923

[Doc. No. AMS-FV-12-0026; FV12-923-1 IR]

**Sweet Cherries Grown in Designated Counties in Washington;
Decreased Assessment Rate**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the Washington Cherry Marketing Committee (Committee) for the 2012-2013 and subsequent fiscal periods from \$0.40 to \$0.18 per ton of sweet cherries handled. The Committee locally administers the marketing order which regulates the handling of sweet cherries grown in designated counties in Washington. Assessments upon Washington sweet cherry handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins April 1 and ends March 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE

FEDERAL REGISTER], will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.gov>.

Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Teresa Hutchinson or Gary Olson, Northwest Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-

mail: Teresa.Hutchinson@ams.usda.gov or
GaryD.Olson@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 923, as amended (7 CFR part 923), regulating the handling of sweet cherries grown in designated counties in Washington, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Washington sweet cherry handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable

sweet cherries beginning April 1, 2012, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate established for the Committee for the 2012-2013 and subsequent fiscal periods from \$0.40 to \$0.18 per ton of sweet cherries handled.

The Washington sweet cherry marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of Washington sweet cherries. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2007-2008 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on May 15, 2012, and unanimously recommended 2012-2013 expenditures of \$64,400 and an assessment rate of \$0.18 per ton of sweet cherries. In comparison, last year's budgeted expenditures were \$72,200. The assessment rate of \$0.18 is \$0.22 lower than the rate

currently in effect. The Committee recommended the lower assessment rate for the purpose of decreasing the monetary reserve, which is approximately \$107,074. Funds in the reserve must be kept within the maximum permitted by the order of approximately one fiscal period's operational expenses (§ 923.42).

The major expenditures recommended by the Committee for the 2012-2013 fiscal period include \$20,000 for administration and data management fees; \$35,000 for Committee expenses such as travel, accounting, and compliance; \$5,000 for contingency; and \$4,400 for office expenses – including bonds, insurance, telephone, office equipment and supplies. Budgeted expenses for these items in 2011-2012 were \$22,500, \$38,000, \$2,500, and \$9,200, respectively.

The assessment rate recommended by the Committee was derived by multiplying anticipated shipments of Washington sweet cherries by various assessment rates. Applying the \$0.18 per ton assessment rate to the Committee's 120,000 ton crop estimate should provide \$21,600 in assessment income. Thus, income derived from handler assessments and interest (\$5) plus \$42,795 from the Committee's monetary reserve would be adequate to cover the recommended \$64,400

budget for 2012-2013. Funds in the reserve were \$107,074 as of March 31, 2012. The Committee estimates a reserve of \$64,279 on March 31, 2013, which would be within the maximum permitted by the order of approximately one fiscal period's operational expenses.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2012-2013 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are 53 handlers of Washington sweet cherries subject to regulation under the order and approximately 1,500 producers in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

National Agricultural Statistics Service has prepared a preliminary report for the 2011 shipping season showing

that the sweet cherry fresh market utilization of 165,000 tons sold for an average of \$2,300 per ton. Based on the number of producers in the production area (1,500), the average producer revenue from the sale of sweet cherries in 2011 can therefore be estimated at approximately \$253,000 per year. In addition, the Committee reports that most of the industry's 53 handlers would have each averaged gross receipts of less than \$7,500,000 from the sale of fresh sweet cherries last season. Thus, the majority of producers and handlers of Washington sweet cherries may be classified as small entities.

This rule decreases the assessment rate established for the Committee and collected from handlers for the 2012-2013 and subsequent fiscal periods from \$0.40 to \$0.18 per ton of sweet cherries. The Committee also unanimously recommended 2012-2013 expenditures of \$64,400. The assessment rate of \$0.18 is \$0.22 lower than the previous rate. The quantity of assessable sweet cherries for the 2012-2013 fiscal period is estimated at 120,000 tons. Thus, the \$0.18 rate should provide \$21,600 in assessment income. Income derived from handler assessments, along with interest income and funds from the Committee's

authorized reserve, will be adequate to cover budgeted expenses.

The Committee recommended the assessment rate decrease for the purpose of decreasing the monetary reserve, which is approximately \$107,074. With this recommended assessment rate and budget, the Committee may need to draw \$42,795 from its monetary reserve, thus helping to decrease the reserve to a level that is less than approximately one fiscal period's operating expenses, the maximum permitted by the order.

The major expenditures recommended by the Committee for the 2012-2013 fiscal period include \$20,000 for administration and data management fees; \$35,000 for Committee expenses such as travel, accounting, and compliance; \$5,000 for contingency; and \$4,400 for office expenses – including bonds, insurance, telephone, office equipment and supplies. Budgeted expenses for these items in 2011-2012 were \$22,500, \$38,000, \$2,500, and \$9,200, respectively.

The Committee discussed alternatives to this rule. Leaving the assessment rate at the current \$0.40 per ton was initially considered, but not recommended because of the Committee's desire to decrease the level of the

monetary reserve so that it is not more than approximately one fiscal period's operational expenses.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the producer price for the 2012-2013 fiscal period could average \$2,300 per ton of sweet cherries. Therefore, the estimated assessment revenue for the 2012-2013 fiscal period as a percentage of total producer revenue is 0.008 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers. In addition, the Committee's meeting was widely publicized throughout the Washington sweet cherry industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the May 15, 2012, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments

on this interim rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0189, Generic Fruit Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This action imposes no additional reporting or recordkeeping requirements on either small or large Washington sweet cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:
www.ams.usda.gov/MarketingOrdersSmallBusinessGuide. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2012-2013 fiscal period began on April 1, 2012, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable sweet cherries handled during such fiscal

period; (2) this action decreases the assessment rate for assessable sweet cherries beginning with the 2012-2013 fiscal period; (3) handlers are aware of this action, which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (4) this interim rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 923

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 923 is amended as follows:

PART 923 - SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

1. The authority citation for 7 CFR part 923 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 923.236 is revised to read as follows:

§ 923.236 Assessment rate.

On and after April 1, 2012, an assessment rate of \$0.18 per ton is established for the Washington Cherry Marketing Committee.

Dated: November 30, 2012

David R. Shipman
Administrator
Agricultural Marketing Service

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